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June 1, 2004

Hon. Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: WT Docket No. 03-66; IB Docket No. 02-364; ET Docket No. 00-258
WRITTEN EX PARTE PRESENTATION

Dear Chairman Powell:

I am writing to bring to your attention specific concerns that W.A.T.C.H. TV Company ("WTC") has in connection with the coming restructuring of the Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") regulatory environment. Since I recently met in Washington with Commissioners Abernathy and Adelstein, with your legal advisor and with the legal advisors to Commissioners Martin and Copps, I understand that a proposal has been advanced that would relocate the two 6 MHz MDS channels currently at 2150-2162 MHz and add two new 6 MHS MDS channels to be auctioned to the 2.5 GHz band, largely by stripping existing licensees of substantial bandwidth. I am writing to express WTC's vigorous opposition to this proposal, to make certain that the unique concerns of WTC are not lost in the effort to resolve the three referenced proceedings over the coming weeks, and to propose an alternative that, while far from perfect, would allow the Commission to move forward in a reasonable manner.

As you may recall, WTC is the licensee of the MDS spectrum and leases the ITFS spectrum at 2150-2162 MHz and 2500-2690 MHz in and around Lima, OH. WTC utilizes that spectrum to provide over 200 channels of digital video and audio service to over 13,000 subscribers. We are fully competitive with the local cable television systems and the Direct Broadcast Satellite services, and provide consumers a similar range of programming at lower cost. In addition, we offer a wireless broadband Internet access service using both an eight-sector, higher-power frequency division duplex ("FDD") system capable of serving over 8,000 subscribers and a recently-launched lower power, non-line of-sight time division duplex ("TDD") system. We currently provide wireless broadband service to over 3,000 subscribers, many of whom have no other source of high-speed Internet access, and that number is growing daily. *WTC uses, and where possible, reuses, every megahertz available to it in the 2.1 and 2.5 GHz bands.*¹

¹ The sole exception is the 125 kHz wide I channels, which have historically been underutilized throughout the industry. As discussed below, these channels can be sacrificed, if necessary, to accommodate relocation of MDS from the 2150-2162 MHz band.

Because WTC and a handful of others have successfully deployed digital video offerings using MDS/ITFS spectrum at great expense (WTC alone has invested almost \$20 million dollars in its system), the Coalition Proposal advanced by the Wireless Communications Association International (“WCA”), the National ITFS Association and the Catholic Television Network included provisions for a “MVPD opt-out.”² Simply stated, the proposed MVPD opt-out would allow any multichannel video programming distributor (“MVPD”) that is providing digital service using more than seven MDS/ITFS channels to avoid being transitioned to the new bandplan and thus to continue operating high-power, high-site facilities in the portions of the spectrum otherwise designated for cellular operations.³ The MVPD opt-out element of the Coalition Proposal was supported by WTC and others, and the proposed opt-out for digital systems has drawn no opposition whatsoever during the formal comment and reply comment pleading cycle or in any ex parte filing. While I understand that the staff is generally supportive of the proposed MVPD opt-out suggested in the Coalition Proposal, I fear that the Commission may be proceeding towards adoption of new rules that inadvertently will have serious adverse consequences for WTC and the viability of its current operations.

WTC OPPOSES THE CREATION OF NEW MDS CHANNELS FOR AUCTION

I am a member of the WCA Board of Directors, and fully agree with the policy and legal arguments that WCA and its counsel have been presenting as to why the proposed taking of material spectrum from incumbent licensees to create new MDS channels for auction is bad policy and contrary to law.⁴ In the interest of brevity, I will not repeat those arguments, but rather will focus on how the proposal more particularly impacts WTC.

My understanding is that, although the two proposed new, non-contiguous MDS channels are insufficient to actually support a new entrant, the contemplated auction is intended to spur incumbent licensees to more quickly deploy services utilizing the MDS/ITFS spectrum. As a general matter, this line of thinking ignores the evidence in the record that operators are poised to deploy new wireless broadband services, and that the impediment is the Commission’s

² See “A Proposal To Revise The MDS and ITFS Regulatory Regime,” Wireless Communications Ass’n Int’l, Nat’l ITFS Ass’n and Catholic Television Network, RM-10586, App. B at 16-18 (filed Oct. 7, 2002) [“Coalition Proposal”]; “First Supplement To A Proposal To Revise The MDS and ITFS Regulatory Regime,” Wireless Communications Ass’n Int’l, Nat’l ITFS Ass’n and Catholic Television Network, RM-10586, at 4-5 (filed Nov. 14, 2002).

³ The seven channel criteria is not arbitrary, but rather is the number of 6 MHz channels that will be in the Middle Band Segment. The Coalition Proposal recognizes that a digital operator using more than seven channels for digital video program distribution is unable to relocate its operations entirely into the Middle Band Segment and thus must continue to operate on spectrum generally reserved for low power cellular services under the proposed bandplan. The Coalition Proposal also provided an opt-out for those who are still utilizing analog video technology, but are serving at least 5% of the population of their service area.

⁴ See, e.g. Letter from Paul J. Sinderbrand to Marlene H. Dortch, WT Docket No. 03-66 (filed May 25, 2004).

obsolete site-based licensing system.⁵ For example, as John Bunce of WinBeam, Inc. and I stressed during our recent joint meetings at the Commission, both of our companies are prepared to launch wireless broadband service in new markets, but cannot economically do so because of the licensing costs associated with the planned multi-cell systems.⁶ Streamline the regulatory process and the record establishes that new systems will be deployed promptly.

The rationale for stripping incumbent licensees of spectrum to spur deployment makes even less sense when one looks at WTC's existing system in Lima. Again, I have to emphasize that we efficiently utilize the spectrum available to us to provide service to the public. Thus, taking spectrum from us for auction will result in a substantial loss of service, not any gain. For example, were the Commission to auction new MDS channels at 2496-2502 MHz and 2619-2625 MHz (as I understand is contemplated by the proposal before you), the loss of spectrum would effectively preclude WTC from using ITFS channel A1 (2500-2506 MHz) and MDS channels F2 (2614-2620 MHz) and E3 (2620-2626 MHz), channels which WTC uses and cannot replace because it has no available replacement spectrum.⁷ No matter how I might reconfigure WTC's offerings in the aftermath of a loss of access to spectrum designated for auction, the reality is that I will have to deprive WTC's subscribers of some video programming and/or broadband service. If the Commission's desire is to spur more rapid deployment of services over currently underutilized spectrum, the Commission has more narrowly-targeted regulatory tools at its disposal short of stripping spectrum from those who actually are using it.

Nor should the Commission accept complaints from industry newcomers that they are unable to secure spectrum in the secondary market. WCA has presented the Commission with compelling evidence that the secondary market for MDS/ITFS is vibrant and fully supportive of new entry.⁸ I can attest to the accuracy of that. As Mr. Bunce and I stressed during our recent Washington meetings, both of our companies have just recently acquired access to spectrum in new market areas through the secondary market. If we can successfully acquire spectrum in the

⁵ See, e.g. Letter from Paul J. Sinderbrand to Marlene H. Dortch, WT Docket No. 03-66 (filed May 18, 2004); Letter from Paul J. Sinderbrand to Marlene H. Dortch, WT Docket No. 03-66 (filed May 19, 2004)(reporting on oral presentations made by the undersigned and a representative of WinBeam, Inc.)

⁶ See *id.*

⁷ Thus, at a minimum, if the Commission creates new MDS channels to be auctioned (and WTC does not believe it should for the reasons set forth by WCA), it should exclude from the authorized service area of the auction winner the protected service area of the MDS and ITFS stations comprising any multichannel video programming system for which the MVPD opt-out is invoked. The Coalition Proposal calls for the operator of any system entitled to invoke the MVPD opt-out to notify the Commission of its eligibility within thirty days of the effective date of the new rules. See Coalition Proposal, App. B at 17. Since it is unlikely that any auction of new MDS channels will be conducted within that timeframe, participants in the auction will have ample opportunity to identify those areas that are likely to be excluded from the geographic service area authorizations on which they are bidding. Moreover, the Commission should impose on any auction winner an absolute obligation to protect the multichannel video system from interference and to suffer any interference caused by the system. Only in this way can the Commission assure that the "new entrant" auction not undermine the MVPD opt-out that the Coalition proposed and those commenting in response to the NPRM unanimously endorsed.

⁸ Letter from Paul J. Sinderbrand to Marlene H. Dortch, WT Docket No. 03-66 (filed May 25, 2004).

secondary market, no larger, better funded entity can legitimately complain that it lacks access to spectrum.

Moreover, taking spectrum from licensees that are using it hardly creates the regulatory certainty that you and the other Commissioners often recognize as necessary to spur deployment of new infrastructure. As I mentioned, WTC is planning to construct a new wireless broadband system that will serve an underserved market adjacent to our existing service area upon the adoption of new, streamlined MDS/ITFS rules. However, if the lesson we learn from this regulatory experience is that the Commission feels free to reallocate spectrum even once it is efficiently used to provide service, WTC's interest in deploying new wireless facilities will undoubtedly diminish.

IF THE COMMISSION RELOCATES MDS 1 AND 2, IT MUST PROVIDE RELOCATION SPECTRUM OUTSIDE THE 2500-2690 MHZ BAND AND ADOPT SPECIAL RULES FOR GRANDFATHERED MVPD SYSTEMS.

I understand that the Commission is considering the possibility of relocating MDS channel 1 to 2562-2567 MHz and MDS channel 2 to 2585-2590 MHz, spectrum which encompasses current ITFS channels C2, D2 and G4. This approach is unacceptable to WTC. Because WTC is efficiently using these leased ITFS channels and has no alternative unused spectrum, adoption of this proposal will result in a significant loss of spectrum available to WTC. The flaw in this proposal is patent – *it is predicated on a transition to the new bandplan and a resulting reduction in the bandwidth of each channel to free spectrum for MDS relocation. Thus, it effectively denies any MDS replacement spectrum to those, like WTC, who will be exercising the MVPD opt-out.* Thus, it is essential that the Commission provide relocation spectrum outside the current 2.5 GHz band that can be used as relocation spectrum. Otherwise, adoption of this proposal will result in a substantial diminution of our service offering, particularly impacting rural areas where residents have access to no other source of broadband.

The bottom line for WTC is simple – unless the Commission is prepared to grant WCA's pending petition for reconsideration and reverse the decision to relocate MDS from 2150-2162 MHz, the Commission must provide replacement spectrum for MDS channels 1 and 2 outside of the 2.5 GHz band that is so heavily utilized by WTC. Nonetheless, WTC appreciates the difficulties the Commission has faced in attempting to find 12 MHz of spectrum for the relocation of MDS channels 1 and 2 outside the 2500-2690 MHz band and would not necessarily oppose an approach that provides less than 12 MHz of new spectrum for those exercising the MVPD opt-out. However, any such approach would need to include certain essential components to assure that those MVPDs are provided relocation facilities with useable capacity equivalent to what they have built out at the time of relocation.

I am troubled to hear that the Commission is thinking of designating replacement spectrum, but not adopting rules to govern the relocation process. This is a recipe for disaster, as neither WTC nor any other holder of a MDS channel 1 or 2/2A license will be able to judge the adequacy of the designated replacement spectrum without a full understanding of the rules

and policies that will govern relocation. Thus, the cloud of regulatory uncertainty will continue to hang over MDS channels 1 and 2/2A and MDS licensees will have no choice but to petition for reconsideration of the upcoming decision to preserve their legal rights pending the adoption of relocation rules. None of this is necessary, however, for the Commission has on three separate occasions sought public comment on the rules to govern MDS relocation from 2150-2162 MHz and has an ample record to resolve the issues.

The question was first raised in the *Notice of Proposed Rulemaking* in ET Docket No. 00-258, which sought comment on the applicability of the Commission's existing microwave relocation policies to MDS relocation.⁹ In response, WCA and others submitted extensive comment on the issue, providing the Commission with a litany of suggestions for modifying those relocation policies to address the unique issues presented by relocation of MDS channels 1 and 2/2A.¹⁰ They stressed that relocation of MDS to any new spectrum will present novel relocation and compensation issues, as it will be the first time the Commission has forced the migration of a mass market, consumer-based subscription service to new spectrum and the first time the Commission has relocated a service where the spectrum is frequently leased to non-licensee system operators who provide service to the public. The Commission asked the same question in the *Further Notice of Proposed Rulemaking* in that docket,¹¹ and again WCA and others provided the Commission with extensive discussion of the issues.¹² When WCA and leading MDS licensees advanced their July 2002 proposal for relocating MDS channels 1 and 2/2A in ET Docket No. 00-258, they provided the Commission with a detailed roadmap for relocation.¹³ Then, when the *Third Notice of Proposed Rulemaking* in ET Docket No. 00-258 sought comment on the WCA proposal and other alternatives for MDS relocation, the Commission again sought comment on application of its existing microwave relocation rules to the relocation of MDS channels 1 and 2.¹⁴ In response to that request, and in ex parte filings thereafter, the MDS industry has repeated the same themes sounded since ET Docket No. 00-258 began regarding

⁹ See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 MHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Spectrum*, Notice of Proposed Rulemaking and Order, 16 FCC Rcd 596, 622 (2001).

¹⁰ See Comments of Wireless Communications Ass'n Int'l, ET Docket No. 00-258, at 48-53 (filed Feb. 22, 2001); Comments of Sprint, ET Docket No. 00-258, at 26-28 (filed Feb. 22, 2001).

¹¹ See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 MHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Spectrum*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 16043, 16061 (2001).

¹² See Comments of Wireless Communications Ass'n Int'l, ET Docket No. 00-258, at 10-14 (filed Oct. 22, 2001) ["WCA FNPRM Comments"]; Comments of Sprint Corp., ET Docket No. 00-258, at 5-6 (filed Oct. 22, 2001).

¹³ See Attachment to "A Compromise Solution for Relocating MDS From 2150-2162 MHz," attached as an appendix to Letter from Wireless Communications Ass'n Int'l, et al., to Michael K. Powell, Chairman, Federal Communications Commission, ET Docket No. 00-258 (filed Jul. 11, 2002) ["MDS Industry 1.9 GHz Proposal"].

¹⁴ See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 MHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Spectrum*, Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order, 18 FCC Rcd 2223, 2257 (2003) ["Third NPRM"].

MDS relocation.¹⁵ Significantly, through all of this none of the other commenters have opposed the compensation requirements proposed by the MDS industry to address these unique circumstances and, indeed, even those who most aggressively advocated the relocation of MDS from 2150-2162 MHz concede that full compensation is required.¹⁶

The compromise proposal WTC today advances is predicted on the proposition that the Commission will be adopting relocation rules based on its existing microwave relocation rules (but with the changes suggested by the MDS industry over the past three years to reflect the novel circumstances here). Most importantly, WTC's proposal is predicated on the winner of the Advanced Wireless Service ("AWS") E Block auction bearing the financial obligation of migrating operations on MDS Channels 1 and 2 to their new spectrum location. Since it is the AWS E Block auction winner that most directly benefits from the relocation of MDS channels 1 and 2, it is fair that it bear this burden. A similar proposal was recently advanced by WCA, BellSouth Corp. and Sprint Corp in ET Docket No. 00-258 and has not drawn any opposition.¹⁷

The question the Commission must ask itself, then, is "how much spectrum will be necessary for an AWS E Block auction winner to replicate the built-out capacity of MDS systems using channels 1 and 2?" Since the staff has apparently concluded that the relocation spectrum should be at or adjacent to the existing MDS/ITFS allocation at 2.5 GHz and the spectrum above 2690 MHz is not available, ideally the Commission should be reallocating at least the 12 MHz at 2188-2500 MHz for MDS channels 1 and 2. Since path lengths at 2.5 GHz are materially shorter than at 2.1 GHz (on the order of one-third to one-half shorter), a megahertz-for-megahertz replacement is the absolute minimum that will provide sufficient capacity. Indeed, by all rights the Commission should be doing here as it did when it relocated the Digital Electronic Message Service to the 24 GHz band and provide MDS licensees with substantially more spectrum to compensate for the inferior propagation characteristics of the replacement spectrum.¹⁸ However, that clearly is not possible without seriously disrupting the Big LEO Mobile Satellite Service ("MSS") licensee in the 2.4 GHz band. It illustrates, however, that even with a megahertz-for-megahertz replacement, MDS licensees will be suffering a material loss from adoption of this proposal.

WTC understands that the staff is examining an alternative to the Coalition Proposal that would reallocate the 2494-2500 MHz band for MDS/ITFS, eliminate the current underutilized I channels at 2686-2690 MHz, reduce the proposed K channels block to 4 MHz and integrate

¹⁵ See e.g. Comments of Wireless Communications Ass'n Int'l, ET Docket No. 00-258, at 28-44 (filed Apr. 14, 2003); Letter from Wireless Communications Ass'n Int'l, *et al.*, to Michael K. Powell, Chairman, Federal Communications Commission, ET Docket No. 00-258, at Appendix A (filed Apr. 7, 2004) ["MDS Industry 2.1 GHz Proposal"].

¹⁶ See Comments of Motorola, Inc., ET Docket No. 00-258, at 13 (filed Oct. 22, 2001); Comments of Nortel Networks, ET Docket No. 00-258, at 5-6 (filed Oct. 19, 2001); Reply Comments of Cingular Wireless LLC, ET Docket No. 00-258, at 4 (filed Nov. 8, 2001).

¹⁷ See MDS Industry 2.1 GHz Proposal at 5-6.

¹⁸ See *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and To Allocate the 24 GHz Band For Fixed Service*, Order, 12 FCC Rcd 3471 (1997).

MDS 1 and 2 as 6 MHz channels within this expanded band. WTC believes that this approach holds great promise for providing MDS relocation spectrum not only in markets that are transitioned to the new bandplan, but also in markets where transition has not occurred (either due to the lack of a proponent or the exercise of a MVPD opt-out).

Because WTC does not contemplate transitioning to the new bandplan, WTC is ambivalent as to precisely where in the expanded 2494-2500 MHz band MDS channels 1 and 2 should be relocated after a transition. WTC will leave it to others to address that question. However, WTC believes that prior to any transition to the new bandplan, MDS channels 1 and 2 should be placed at 2494-2500 MHz and 2686-2690 MHz, respectively. Admittedly, this leaves MDS channel 2 with a 2 MHz shortfall until transition to the new bandplan (at which time WTC anticipates that a full 6 MHz channel will be made available). However, such a result appears unavoidable given the limited amount of spectrum outside the existing 2.5 GHz band. At least this approach provides operators in non-transitioned markets with access to 10 MHz of replacement spectrum that can be used for wireless broadband services. Although the adequacy of this amount of spectrum to accommodate relocation of existing MDS channel 1 and 2 operations will depend on a case-by-case analysis, WTC believes that it generally will be possible for the AWS E Block winner to migrate MDS channel 1 and 2 operations to MDS channel 1 at 2494-2500 MHz and MDS channel 2 at 2690-2500 MHz by deploying cellularized systems that both accommodate the shorter path lengths at 2.5 GHz and provide for frequency reuse to address the spectrum shortfall.¹⁹

The mechanics of relocating MDS licensees and system operators from 2150-2162 MHz to an expanded 2.5 GHz band need not be complicated. Indeed, as WCA and others have previously noted on two separate occasions in ET Docket No. 00-258, the Fixed Microwave Service ("FMS") relocation rules set forth in Sections 101.69 *et seq.* of the Commission's Rules provide a useful starting point for establishing a transitional mechanism.²⁰ WTC agrees with WCA that, similar to the process used to free the FMS spectrum for broadband Personal Communications Service ("PCS"), a one-year voluntary negotiation period, should apply, commencing when the winner of the auction for the AWS E Block spectrum serves a written request for negotiation on the MDS licensee.²¹ If the auction winner, licensee and any system

¹⁹ Of course, that migration will have to be accomplished in a way that does not cause harmful interference to operations on adjacent MDS and ITFS channels.

²⁰ See MDS Industry 1.9 GHz Proposal, App. A at 1-3; MDS Industry 2.1 GHz Proposal, App. A at 1-3.

²¹ See *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd 6589, 6598 (1993); see also 47 C.F.R. § 101.69(b). However, as previously discussed by the MDS industry, provisions for separate negotiations with any system operator utilizing the MDS channels will have to be included in the MDS relocation rules to reflect the fact that MDS channels, unlike the FMS links at issue when the Part 101 relocation rules were initially drafted, are frequently leased to system operators who have made substantial investments in reliance on those leases and must be reimbursed for costs incurred as a result of any relocation. Although consumers may, in some cases, have purchased MDS equipment, such consumers have subscriber relationships with system operators who can be expected to protect the consumers' interests in relocation negotiations. Thus, although operators will have to be reimbursed for the costs they incur in reimbursing consumers, direct negotiations between consumers and the AWS E Block auction winner can be avoided.

operator/lessee are unsuccessful in negotiating a settlement within that one-year voluntary negotiation period, an involuntary relocation procedure similar to that afforded by Section 101.75 of the Commission's Rules (but modified to reflect both the additional cost considerations present with an MDS relocation and the role of the system operator) could then be invoked by the affected AWS E Block auction winner. From WTC's perspective, all it requires is that the AWS E Block auction winner provide facilities operating on the replacement spectrum that can provide each of WTC's then-existing subscribers with service at the same throughput rates as they enjoy at present and have the same overall capacity as WTC has built out at the time.

As WCA has previously discussed with respect to prior proposals for MDS relocation, the involuntary relocation procedures set forth in Section 101.75 will require modification to reflect that any relocation of MDS to the 2494-2500 MHz and 2686-2690 MHz bands adds a new wrinkle to the Commission's prior experience with forced migrations, as MDS will be unable to relocate until the replacement spectrum is first cleared of current users.²² In this case, those incumbents include the Broadcast Auxiliary Service licensees authorized to operate on channel A10 and MSS. Because of the need for a sequential, dual band-clearing here (which was not required when the FMS rules were adopted), any MDS relocation rule based on Section 101.75 will have to be modified such that the commencement of mandatory negotiations between an MDS licensee or system operator/lessee and the applicable AWS E Block auction winner is deferred until the date on which the 2494-2500 MHz band is fully cleared of all incumbent operations within the MDS licensee's service area, plus any incumbent operations within the MDS licensee's Proximity Threshold calculated under Section 24.247 of the Rules and any additional incumbent operations that might otherwise interfere with MDS.

The Commission permits FMS licensees to self-relocate and later secure compensation for their expenses.²³ As WCA has previously suggested, to avoid undue delay in the clearing of the 2494-2500 MHz bands and the relocation of MDS, the Commission must permit MDS licensees and system operator/lessees, at their sole discretion, to undertake the expenses of the band-clearing and relocation subject to later reimbursement.²⁴ Thus, to promote the earliest possible relocation of MDS from the 2150-2162 MHz band, MDS licensees should be provided with immediate authority to operate in the 2494-2500 MHz band (subject to the clearing of that band) and the 2686-2690 MHz band, as well as the 2150-2162 MHz band. For there to be a seamless transition of subscribers requires that systems operate concurrently in the 2150-2162 MHz band and in the relocation spectrum until all subscribers can be provisioned with the equipment necessary to operate on the relocation spectrum. Providing MDS licensees the earliest possible access to the relocation bands will expedite both the transition of subscribers that are currently receiving service via the 2150-2162 MHz band and the freeing of the AWS E

²² See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 16043, 16048, 16057-58 (2001) ["FNPRM"].

²³ See *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, Second Report and Order, 12 FCC Rcd 2705, 2717-18 (1997).

²⁴ See MDS Industry 1.9 GHz Proposal, App. A at 2; MDS Industry 2.1 GHz Proposal, App. A at 2.

Block, as it will permit MDS licensees (if they so choose) to immediately construct facilities in the replacement bands and commence the process of providing subscribers with the equipment necessary to receive service in the new spectrum.²⁵

For this proposal to work, however, the spectrum at 2494-2500 MHz must be fully usable. Just last year, in authorizing the Ancillary Terrestrial Component (“ATC”) for MSS, the Commission carefully evaluated the issues associated with MSS/ATC and MDS/ITFS coexistence. Under the rules in place today: (1) the MDS/ITFS licensee bordering MSS provides adjacent channel protection by meeting the general spectral mask set out in Section 74.936 of the Commission’s Rules and has no special obligations towards MSS; (2) the MSS licensee must provide a 2 GHz guardband between any ATC operations and the MDS/ITFS band; and (3) the MSS licensee must cure any interference that its ATC operations cause to nearby licensed services pursuant to Section 25.255.²⁶ It should be noted that no petition for reconsideration of this approach was filed by Globalstar, the sole remaining MSS licensee in the 2483.5-2500 MHz band, or anyone else. To assure that the 2494-2500 MHz band is useable for MDS, the Commission must retain these three provisions in any final rules. In other words, the only change in the relationship between MSS and MDS/ITFS should be a change in the boundary from 2500 MHz to 2494 MHz.

Globalstar cannot legitimately object to adoption of this approach. Indeed, WTC is proposing that Globalstar only “lose” 6 MHz of spectrum in the 2483.5-2500 MHz band, as compared to the Commission’s proposal in the *Notice of Proposed Rulemaking* in IB Docket No. 02-364 to reduce Globalstar’s spectrum in the band by as much as 11 MHz.²⁷ Given that the Commission had sought comment on the reallocation of as much as 11 MHz of the 2483.5-2500 MHz MSS allocation before Globalstar was acquired by Thermo Capital Partners, L.L.C., Globalstar’s recent assertion that its purchase was predicated on the assumption that 13.73 MHz to 13.905 MHz of the S-band would remain licensed to Globalstar is absolutely incredible.²⁸

Indeed, long before the issuance of the *Notice of Proposed Rulemaking* in IB Docket No. 02-364, Globalstar was on explicit notice that it would not have exclusive use of the entire 16.5 MHz in the 2483.5-2500 MHz band. As the Commission considers WTC’s proposal, do not lose sight of the fact that we would leave Globalstar with exclusive access to 10.5 MHz of downlink MSS spectrum. This is significantly more spectrum than Globalstar was entitled to under the original Big LEO band plan, where it was to share the 16.5 MHz of spectrum with

²⁵ See Comments of Wireless Communications Ass’n Int’l, ET Docket 00-258, at 8 n. 14 (filed Oct. 22, 2001); Reply Comments of Wireless Communications Ass’n Int’l, ET Docket No. 00-258, at 33 n. 88 (filed Mar. 9, 2001).

²⁶ *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 1962, 2063-4 (2003) [“ATC Order and NPRM”].

²⁷ See *id.* at 2091 (“Under the plan adopted in this Order, spectrum in the 2483.5-2492.5 MHz and 2498-2500 MHz bands could be available for other uses.”).

²⁸ See Letter from William D. Wallace to Marlene H. Dortch, IB Docket No. 02-364, at 1 (filed Feb. 26, 2004) [“Globalstar Feb. 26, 2004 Ex Parte”].

three other CDMA Big LEO systems. Globalstar's current access to the entire band is merely the results of attrition, as two license cancellations and the return of one license have left Globalstar as the only remaining CDMA Big LEO operator.

When the Commission first developed the Big LEO band plan, it anticipated that some of the systems might not be constructed, and indicated that if that circumstance should occur, then the spectrum would be re-assigned. In that context, the Commission stated that:

In the unlikely event that only one CDMA system is implemented, we propose to reduce the bandwidth assigned to that system from 11.35 MHz to 8.25 MHz, even if some of the system's space stations are in-orbit and operating. An 8.25 MHz assignment should be sufficient to implement a viable system and should also provide us with some flexibility when coordinating the system. It may also provide some room for expected growth.²⁹

Ultimately, the Commission elected to address the situation of a remaining single CDMA Big LEO licensee only if it arose, and, now that the situation has arise, the instant *Notice of Proposed Rulemaking* in IB Docket No. 02-364 is the result. Clearly, however, the 10.5 MHz of downlink spectrum Globalstar would receive under WTC's proposal is significantly more than the 8.25 MHz the Commission deemed sufficient at the time of the original Big LEO allocation. In addition, by way of comparison, the Commission has granted 2 GHz MSS licensees just 5 MHz of downlink spectrum.³⁰ Its recent protestations notwithstanding, Globalstar has no legitimate complaint if, at the conclusion of this proceeding, it remains the sole CDMA Big LEO licensee and retains 10.5 MHz of MSS downlink spectrum.

Similarly, the 8.5 MHz of spectrum in the S-band that WTC's proposal would allow Globalstar to use for ATC services is also more than adequate, providing Globalstar with 3 MHz *more* spectrum for ATC than the Commission granted just last year.³¹ It would defy credulity for Globalstar to argue that 8.5 MHz of ATC downstream spectrum in the S-band, when combined with its 5.5 MHz of ATC upstream spectrum assigned in the 1.6 GHz band, is inadequate, particularly when this 14 MHz is compared to the 10 MHz (total) of ATC spectrum assigned to each of the 2 GHz MSS licensees.

I recognize that Globalstar now contends it can only afford to have the Commission reallocate 4.6 MHz of the 2483.5-2500 MHz band.³² However, given the history of the Big

²⁹ *Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, Notice of Proposed Rulemaking, 9 FCC Rcd 1094, 1112 (1994).

³⁰ See, e.g., *Celsat America, Inc.*, Order, 18 FCC Rcd 12337 (2003) (20 MHz of uplink and 20 MHz of downlink MSS spectrum in the 2 GHz band is to be divided equally among the remaining four licensees).

³¹ *ATC Order and NPRM*, 18 FCC Rcd at 2011 ("To avoid any possible prejudice to the outcome of allocation and assignment decisions under consideration in the Notice of Proposed Rulemaking adopted below, we adopt an upper limit of 5.5 MHz in each direction for possible MSS ATC operations.").

³² See Globalstar Feb. 26, 2004 Ex Parte at 2-3.

LEO licensing process and Globalstar's own limited usage to date, it is difficult to envision a scenario under which Globalstar would have a legitimate need for more spectrum than provided for under WTC's proposed approach. While Globalstar has previously claimed that it is "fully utilizing" the 2483.5-2500 MHz band, it has subsequently conceded that it is merely using 7.5 MHz of the band and has conceded that it could make do with less than the entire band.³³ While I am certainly no expert in satellite system design, the evidence introduced into the record by Iridium strongly suggests that Globalstar is using spectrum in a highly inefficient manner.³⁴

Globalstar's actual usage bears this out. In IB Docket No. 02-364, evidence has been introduced as to the current usage of the Globalstar and Iridium systems. On a relative basis, Globalstar appears to be using its spectrum much less efficiently than Iridium – for the first half of 2003, Iridium supported more than 1.5 times the number of minutes as Globalstar in less than one-fifth of the spectrum.³⁵ Moreover, according to Globalstar, Iridium should be able to support more than 500,000 customers in the Continental United States alone with its 5.15 MHz of spectrum.³⁶ As such, it is difficult to credit Globalstar's assertion that it is "fully utilizing" the 27.85 MHz (uplink and downlink) assigned to CDMA Big LEO systems while serving just some 100,000 customers world-wide. At a time when the Commission apparently must take some spectrum from all MDS and ITFS licensees at 2.5 GHz in order to accommodate the relocation of MDS channels 1 and 2, it should not blindly accept Globalstar's claim to more spectrum than it reasonably needs. The record in IB Docket No. 02-364 certainly suggests that taking just 6 MHz from the S-band, rather than the 11 MHz suggested in the *Notice of Proposed Rulemaking* will be a "win" for Globalstar.

CONCLUSION

WTC recognizes that the Commission faces a difficult task as it attempts to accommodate a variety of spectrum management goals in this proceeding. As you proceed, please remember that at every step of the Commission's evolutionary approach to MDS and ITFS, WTC has followed the Commission's lead. When you promoted analog video, we provided our subscribers analog video, and when you authorized digital video transmissions, we were one of the first companies in the country to provide our subscribers with a digital MDS/ITFS service. When you first authorized downstream only data distribution, we introduced an Internet service that transmitted Internet content downstream and used dial-up telephone return paths. And, when you allowed MDS/ITFS spectrum to be used for two-way wireless services, we converted our Internet service to full two-way wireless technology. As that technology has evolved, we have introduced that which is most spectrally and economically efficient.

³³ Compare Joint Comments of L/Q Licensee, Globalstar and Globalstar USA, IB Docket No. 02-364, at 6 (filed Jul. 11, 2003) ["Globalstar Comments"] with Globalstar Feb. 26, 2004 Ex Parte at 1.

³⁴ See Letter from Peter D. Shields to Marlene H. Dortch, IB Docket No. 02-364, Attachment at 7 (filed Mar. 17, 2004).

³⁵ See *id.*, Attachment at 2.

³⁶ Globalstar Comments at 13.

In short, WTC has been a good steward of the MDS/ITFS spectrum. Whatever frustration the Commission may have with the performance of others, it should not adopt rules and policies that unfairly penalize WTC in order to redress marketplace shortcomings elsewhere. Sound public policy dictates that the Commission not strip WTC of spectrum that it is using efficiently and that the Commission assure that WTC's 2.1 GHz band is relocated to suitable alternative spectrum at no cost to WTC or its customers. Anything less would send a message to those contemplating investment in the communications sector that regulatory certainty is an ephemeral concept and that no good deed goes unpunished.

Respectfully submitted,

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